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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1311

HUDSON VALLEY ASBESTOS CORPORATION,

Petitioner,

against

TOUGHER HEATING & PLUMBING CO., INC., TRI-CITY INSULATION COMPANY, INC., E. W. TOMPKINS CO., INC., ROBERT TOUGHER, JOHN TOUGHER, EARL MEGE, ELBERT W. TOMPKINS, JR., HARRY E. TOMPKINS, SR., and HARRY E. TOMPKINS, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
QUESTIONS PRESENTED	1
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT	5
I Petitioner Fails to Present Any Grounds to Support the Issuance of a Writ of Certiorari	5
II The Second Circuit Correctly Followed and Applied the Rule of U.S. v. Socony Vacuum Oil Co. under Section 1 of the Sherman Act	9
III There Has Been No Abandonment By The Second Circuit of the Test for Standing As Stated in Billy Baxter, Inc. v. Coca Cola Co., Under Section 4 of The Clayton Act And Thus No Conflict With Other Court Decisions	12
IV There Is No Significant Issue That Should Be Settled By This Court Under Section 7 of The Clayton Act	13
V There Similarly Has Been No Other Departure From Precedent Under Section 1 of the Sherman Act	14
CONCLUSION	15

TABLE OF AUTHORITIES

CASES

	Page
Billy Baxter, Inc. v. Coca Cola Co. 431 F.2d 183 (2d Cir. 1970) cert. denied 401 U.S. 923.....	8, 12, 15
GAF Corp. v. Circle Floor Co., 329 F. Supp. 823 (S.D.N.Y. 1971), aff'd, 463 F.2d 752 (2d Cir. 1972) cert. dismissed 413 U.S. 901.....	13
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949).....	15
Klor's, Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959).....	10
U.S. v. Johnson, 268 U.S. 220 (1925).....	5, 7
U.S. v. Socony Vacuum Oil Co., 310 U.S. 150 (1940).....	8, 9, 10, 15

STATUTES

The Sherman Act, Section 1; 15 U.S.C. §1.....	9, 14, 15
The Clayton Act, Section 4; 15 U.S.C. 15.....	12, 15
The Clayton Act, Section 7; 15 U.S.C. 18.....	13, 14, 15

RULES

Rule 19(1)(b) of The Rules of the Supreme Court of the United States	5

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OPINION BELOW

The opinion of the Second Circuit Court of Appeals has recently been reported at 510 F.2d 1140.

QUESTIONS PRESENTED

1. Does the petition warrant the issuance of a Writ of Certiorari in the instant case simply to review factual determinations made by a District Court, which were affirmed, in the absence of

any significant questions of federal antitrust law or its application.

2. Whether the decision of the Court of Appeals affirming the District Court determination that there was no violation of the Sherman Act and no causal connection between the alleged antitrust violations and petitioner's business termination warrants review.

3. Whether the decision of the Second Circuit that Section 7 of the Clayton Act was not applicable warrants review in the circumstances of this action.

COUNTERSTATEMENT OF THE CASE

Respondents shall highlight herein certain inaccurate and misleading statements of fact contained in the Hudson Valley petition.

1. Petitioner asserts that Hudson Valley competed for insulation subcontracts primarily in Albany, Rensselaer and Schenectady counties in the State of New York (Pet. 3).*

The geographic market as determined by the District Court for Hudson Valley included an additional eight counties (B-8). The Second Circuit affirmed this finding (A-6, ftnt 2).

2. Petitioner asserts that "in the year

*References to the pages of the Petition are (Pet.__), references to the pages of the Appendices contained in the Petition are (A__), (B__) etc.

Tri-City was formed Tougher Co. and Tompkins Co. together controlled 44% of the insulation contracts let in the counties of Albany, Schenectady and Rensselaer. For the next four years the average was over 23%.***This represented control of over $1,000,000 worth of insulation contracts." (Pet. 4)

The District Court stated as to these statistics "[i]n light of the much larger geographic market which we have found relevant, plaintiff's figures are probably unduly favorable to plaintiff's case." (B-10).

3. Petitioner asserts "The Court of Appeals found that Tougher and Tompkins, who had founded Tri-City for the purpose of depressing prices bid to these companies, instructed Tri-City's manager as to bidding. (A-5, Appendix D)" (Pet. 4).

There are several material misstatements of fact contained therein. First, the Court of Appeals stated that Tougher and Tompkins were "dissatisfied with the subcontractors with whom they had been dealing and wanted to obtain fair and reasonable prices for insulation work." (A-3)

The District Court decision adds to reasonable and fair the adjective "competitive" prices for insulation work (B-3)." These findings are significantly different from petitioner's blithe assertion that the purpose was to depress prices bid to these companies.

Furthermore, the Second Circuit expressly found:

> "there is no indication that they conspired to set the level of Tri-City's bids. Indeed, Kuhl was apparently given a free hand to

determine the figure Tri-City would submit on any particular job. His instructions were only to submit a fair price, which would reflect his costs plus some allowance for profit. (A-5)."

This last is obviously significantly different from petitioner's statement which implies that Tougher and Tompkins instructed Kuhl what to bid to their companies.

4. Petitioner asserts "The District Court found that subsequent to its formation Tri-City received all of the insulation subcontracts to the exclusion of other subcontractors of Tougher Company and Tompkins Company in the three-county area of Albany, Schenectady and Rensselaer." (Pet. 4)

Petitioner omits that directly following this sentence the District Court significantly added as part of the same sentence "but both companies awarded contracts to other insulation contractors within the larger geographic market which we have found, although Tri-City competed in that market." (B-10) The very next paragraph of the District Court opinion states:"The evidence also established that Tougher Co. and Tompkins Co. awarded all of their contracts to Tri-City in the three-county area because the other insulation contractors, after the formation of Tri-City, refused to make bids to Tougher Co. and Tompkins Co. in competition with Tri-City." (B-11) The Court of Appeals affirmed this specific finding, "At the same time, however, the three other insulation subcontractors in this area had refused to submit bids to Tougher and Tompkins..." (A-6) (Emphasis supplied)

ARGUMENT

I

Petitioner Fails to Present Any Grounds to Support the Issuance of a Writ of Certiorari

In essence, petitioner seeks a trial de novo in this tribunal for an antitrust complaint filed in 1964 which was tried as a non-jury case before the United States District Court for the Northern District of New York in 1972. The petition attempts to assert grounds bringing this action within the provisions specified in Rule 19(1)(b) of the Rules of Supreme Court of the United States and apparently attempts to assert additional grounds to support the issuance of writ of certiorari. Upon examination these grounds are illusory.

It has not been the usual practice of this Court to grant certiorari to review evidence or to discuss specific facts, U.S. v. Johnson, 268 U.S. 220, 227 (1925). The case was tried by the Court without a jury, and basic issues of fact were found in favor of the defendants. One basic issue of fact was petitioner's claim that Robert Tougher and Harry Tompkins had hired plaintiff's manager, Henry Kuhl away from it in August, 1961 as part of the conspiracy to destroy it. A second issue of fact was whether the Tougher Company had cancelled two contracts with petitioner, or whether petitioner voluntarily returned them to Tougher. A third issue of fact was whether petitioner was driven out of the insulation contracting business by actions of the defendants, or whether it voluntarily went out of that portion of its business (which was only about 5% of its total business. (B-2)

Pertinent holdings of the District Court on these issues of fact were:

> "Indeed, Pursel admitted that he never mentioned the cancellation of these contracts to Tougher. Only Kuhl could have corroborated Pursel's hearsay testimony but Kuhl was not called as a witness. In light of all the circumstances, we therefore credit Tougher's testimony and reject Pursel's as to the cancellation of the contracts and find that they were voluntarily rescinded by Hudson Valley."
>
> * * *
>
> "Plaintiff now argues that the 'core of [plaintiff's] case' is that the 'elimination of plaintiff from the market share controlled by defendants destroyed plaintiff's insulation business.' The evidence, however, indicates that plaintiff voluntarily terminated its insulation contracting business. Pursel made a business decision to stop submitting bids for insulation contracting work. In short, plaintiff has not shown any causal connection between any alleged antitrust violation of defendnats and the termination of plaintiff's insulation contracting business. Hudson Valley simply withdrew from the competitive arena. The antitrust laws are concerned not with the protection of competitors but with competition. Nevertheless, we shall review plaintiff's antitrust claims." (B-4) (Emphasis supplied)

The Second Circuit decision on these issues states:

"In May 1961 Robert Tougher and Harry E. Tompkins, Sr. first discussed the possibility of forming their own insulation subcontracting company.

* * *

Shortly thereafter, in August 1961 Henry Kuhl, who had single-handedly managed Hudson Valley's insulation business for many years, sought employment at Tri-City and signed an employment contract for about 40% greater salary than he had received at Hudson Valley plus an incentive bonus of 10% of profits. Pursel made the decision to terminate the insulation business almost immediately, and voluntarily returned two already existing insulation subcontracts to Tougher. (Emphasis supplied)

However, the district court explicitly found that Hudson Valley voluntarily terminated its insulation contracting business and that there was no causal connection between the alleged antitrust violations and this business decision. Particularly in light of the departure of plaintiff's long-time manager and the rather precipitous termination soon thereafter, we are unable to say that this finding was erroneous." (A-3)

Under the principle of U.S. v. Johnson, supra, there clearly is no compelling reason to review the facts here. However, since both the District Court and the Circuit Court of Appeals nevertheless did discuss the legal issues, defendants shall do so.

Petitioner claims that the Second Circuit

has (1) overruled "U.S. v. Socony Vacuum Oil Co. 310 U.S. 150 (1940) (Pet. 5) - when it has followed and relied upon that decision; (2) "abandoned the standing test of Billy Baxter Inc. v. Coca Cola Co. 431 F. 2d 183 (2d Cir. 1970) cert. denied 401 U.S. 923, thereby "conflicting" with the decisions of other Circuits (Pet. 6) - when it has followed and relied upon that decision, (3) "erroneously held...[that an] acquisition is not an indirect acquisition under Clayton Act §7" (Pet. 11) when its holding is patently correct, and (4) "exonerated a combination upon the grounds that it was only engaged in a price-fixing scheme, i.e., to drive down market prices" (Pet. 12) when it is clear that no such scheme existed as determined by the District Court and as affirmed by the Second Circuit.

II

The Second Circuit Correctly Followed and Applied the Rule of U.S. v. Socony Vacuum Oil Co. under Section 1 of the Sherman Act

Rule 19(1)(b) of this Court's Rules states that a writ of certiorari may issue upon a showing that a court of appeals has decided a federal question in a way in conflict with applicable decisions of this Court. Petitioner apparently relies upon this ground in Point I of its "Reasons for Granting the Writ." (Pet. 5) It argues first that the Second Circuit "has sanctioned a combination of buyers formed for the purpose of depressing prices and has thus overruled U. S. v. Socony Vacuum Oil Co., 310 U.S. 150" (Pet. 5)

This is a specious issue. Petitioner tried this case under Section 1 of the Sherman Act as a concerted refusal to deal case. In fact, petitioner's trial brief failed to refer to any price-fixing issue. The issue was first raised in its appeal to the Second Circuit and the Second Circuit found that there was no evidence of any price-fixing scheme.

The Second Circuit expressly relied upon the Socony decision. Its opinion states:

> "Hudson Valley alleges that the defendants violated section 1 of the Sherman Act by engaging in both price fixing and a concerted refusal to deal with insulation subcontractors other than Tri-City.

Either allegation, if true, would constitute a per se violation of Section 1. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing) Klor's, Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959) (concerted refusal to deal).

With respect to the price-fixing claim, the district court found no evidence that any such scheme existed. Although Tri-City was formed out of apparent dissatisfaction with the high level of the bids Tougher and Tompkins were receiving from insulation contractors, there is no indication that they conspired to set the level of Tri-City's bids. Indeed, Kuhl was apparently given a free hand to determine the figure Tri-City would submit on any particular job. His instructions were only to submit a fair price which would reflect his costs plus some allowance for profit." (A-5) (Emphasis supplied)

The District Court stated:

"Indeed, all price-fixing claims were dropped during the trial." (B-10)

The touchstone of price-fixing is the creation of an artificial price structure. As this Court stated in Socony, "market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of...prices by free competition above." (at p. 233) No artificial price structure existed which could be attributed to the respondents.

Petitioner failed at the trial to offer

any evidence that "prices" were fixed at or below a competitive market price and there is no reference by petitioner in its brief to any specific kind of "fixed" price or what the competitive price would have been absent the alleged conspiracy. There is no evidence to support petitioner's assertion that Tri-City was formed "for the stated purpose of depressing the price bid to Tougher Co. and Tompkins Co." (pp. 4 and 6) On the contrary, the Second Circuit stated: "there is no indication that they conspired to set the level of Tri-City's bids." (A-5) The District Court found that petitioner "offered no evidence that Tri-City consistently underbid other concerns through a price-fixing arrangement with Tougher Co. and Tompkins Co." (B-10)

Respondents agree with petitioner's statement that "it is a per se violation for buyers to refuse to trade for the purpose of coercing sellers to deal at a price fixed by buyers." (Pet. 6) However, petitioner's statement that "[i]t is clear that Tougher Co. and Tompkins Co. would not deal with insulation subcontractors other than Tri-City unless they met the depressed prices dictated by the combination" (Pet. 6) "simply ignores the Second Circuit's review of that very issue. It concluded that "[t]he contention that Tougher and Tompkins together refused to deal with insulation subcontractors other than Tri-City is also not supported by the evidence." (A-5) Similarly, the District Court found:

> "The evidence also established that Tougher Co. and Tompkins Co. awarded all of their contracts to Tri-City in the three-county area because the other insultion contractors after the formation of Tri-City, refused to make

bids to Tougher Co. and Tompkins Co. in competition with Tri-City. Their refusal to bid was based on an erroneous assumption that Tougher Co. and Tompkins Co. would favor Tri-City but their supposition was unfounded." (B-11)

* * *

"There has been no showing of any refusal to deal here. Indeed, since the insulation contractors refused to submit bids to Tougher Co. and Tompkins Co., there is no direct evidence that those companies would refuse to consider such bids." (B-14)

Petitioner in essence simply disagrees with the findings of fact by the District Court and seeks to convince this Court that the Second Circuit affirmance was erroneous in spite of no supporting evidence in the record.

These "issues" are clearly not such as to warrant the issuance of a writ of certiorari.

III

There Has Been No Abandonment By The Second Circuit of the Test for Standing As Stated in Billy Baxter, Inc. v. Coca Cola Co., Under Section 4 of The Clayton Act And Thus No Conflict With Other Court Decisions

Petitoner next argues in its Point II that the Second Circuit has "abandoned the standing test announced in Billy Baxter,Inc. v. Coca Cola Co." 431 F. 2d 183 (2d Cir. 1970) cert. denied 401 U.S. 923. This is a phantom issue. Again the Second Circuit relied upon

the very decision to support its decision which the petitioner now claims it abandoned. This is again no more than an effort to reverse the District Court's findings of fact which were affirmed.

There is no support for petitioner's statement that Tri-City was formed for the "stated purpose of driving Hudson Valley's prices down." (Pet. 7) But there is support for finding by the District Court that "Hudson Valley simply withdrew from the competitive arena." (B-4) And the Second Circuit affirmed it, "Particularly in light of the departure of plaintiff's long-time manager and the rather precipitous termination soon thereafter, we are unable to say that this finding was erroneous." (A-3)

IV

There Is No Significant Issue That Should Be Settled By This Court Under Section 7 of the Clayton Act

If the creation of Tri-City were held to be an "indirect" acquisition by Tougher, Inc. and Tompkins, Inc., such a holding would, in the context of this case stand Section 7 of the Clayton Act on its head and result in a wholly unpredicted and unpredictable interpretation of that law.

The Second Circuit properly held that there was no "indirect" acquisition by these two corporate defendants and followed GAF Corp. v. Circle Floor Co., 329 F. Supp 823 (S.D.N.Y. 1971), aff'd 463 F. 2d 752 (2nd Cir. 1972) cert. dismissed pursuant to Rule 60, 413 U.S. 901.

With respect to the Clayton Act Section 7

allegations, the District Court stated that it was doubtful whether Section 7 applied to the "acts of the individuals Tougher and Tompkins in establishing Tri-City [to] make this an indirect acquisition by Tougher Co. and Tompkins Co. However, if Section 7 does apply, plaintiff has failed to establish a violation." (B-17) The Second Circuit went further and held that "under [the] circumstances section 7 does not apply." (A-9)

Clearly this case present no reason to disturb this finding or to warrant certiorari on this issue in view of the factors expressly considered by the Second Circuit. (A-8, A-9)

Petitioner also seeks to reverse the findings of the District Court that "plaintiff has failed to establish a violation." (B-17, B-18) It is patent that there has been no violation of Section 7 in the circumstances of this case.

Petitioner's reference to Section 1 of the Sherman Act (Pet. 12) is another belated attempt to insert for the first time in this litigation a new cause of action which was neither pleaded nor tried.

V

There Similarly Has Been No Other Departure From Precedent Under Section 1 of the Sherman Act

In Point IV petitioner claims that "[t]his is the only case known to petitioner in which a Federal Court has, in effect, exonerated a combination upon the grounds that it was only engaged in a price-fixing scheme, i.e. to drive down market prices." (Pet. 12)

This claim merely restates petitioner's conclusions about the substance and effect of the decisions of the lower courts. As discussed in Point II herein, this claim is illusory and no more than a final attempt to inject a new issue in the case that was decided to be wholly without merit.

CONCLUSION

In Graver Mfg. Co. v. Linde Co. 336 U.S. 271, 275 (1949) this Court held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." There has been no showing of any fact finding error made by the Courts below, much less of an obvious and exceptional showing of such error.

Despite petitioner's claims, it should be clear that the Second Circuit has neither overruled U.S. v. Socony Vacuum Oil Co., supra, under Section 1 of the Sherman Act, nor abandoned the standing test of Billy Baxter, Inc., supra., under Section 4 of the Clayton Act. The "indirect" acquisition issue under Section 7 of the Clayton Act fails in the context of this case to warrant review. There does not exist any other compelling reason for this Court to grant a writ of certiorari.

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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